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No. 88-1128

In the Supreme Court of the United States

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ANTONE FOLKINS, et al.,
Respondents.

On Writ of Certiorari to the California Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the federal government by virtue of the United States Constitution's supremacy and commerce clauses and pursuant to Congress' trust responsibilities to the Indian people exceeded its authority in regulating fishing resources for the commerce and subsistence of Indian people in waters flowing through an Indian reservation.

PARTIES

The respondents are Antone Folkins and Kenneth Mattz. The petitioners are the People of the State of California, the real party in interest below. The State of Alaska has filed an amicus curiae brief in behalf of the States of Alaska, Colorado, Kansas, Montana, Nevada, North Dakota, Oklahoma, and Wyoming.

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OPINIONS BELOW

The decision of the California Supreme Court is reported at 46 Cal 3d 355 and is reprinted in Petitioner's App. 1. The decision of the California Court of Appeal is reported at 195 Cal App. 3d 431 and is reprinted in Petitioner's App. 31. The decision of the California Superior Court has not been officially reported but is reprinted in Petitioner's App. 45. The decision of the Del Norte County Justice Court, Del Norte Judicial District has not been officially reported but is reprinted at App. 1.

APPLICABLE STATUTES

In addition to the federal laws set forth in the Petition, Respondent contends that the following Articles of the United States Constitution are applicable:

Article VI, Clause 2 states:

> **"Supreme Law of Land**
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article IV, Section 3, Clause 2 states:

> **"Public Lands**
>
> The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property

belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

Article I, Section 8 vests power in Congress at Clause 3 as follows:

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

STATEMENT OF THE CASE

1. Background of the Controversy

The Yurok Indians had long resided along the banks of the Klamath River before the State of California's admission to the Union in 1850. The area was ideal for the Yuroks because they subsisted on the salmon and other fish that abounded in the river. Five years after the state's admission to the Union, President Franklin Pierce formally established the Klamath River Reservation by executive order.

In 1876 the Hoopa Valley Indian Reservation was formally set aside for Indian purposes pursuant to Congressional legislation of 1864. In 1891, the original Hoopa Valley Indian Reservation was extended by executive order to include a connecting strip between it and the Klamath River Reservation. This connecting strip was thirty miles in length and roughly two miles wide. The northern and southern exterior boundaries of the connecting strip were described as one mile in width on each side of the Klamath River from the present limits of the Hoopa Valley Reservation to the Pacific Ocean. The Klamath River Reservation was then considered part of the Hoopa Valley Reservation, as extended.

The history of the Hoopa Valley Indian Reservation has been extensively detailed in two United States Supreme Court, and numerous lower court, decisions over the past

seventy-five years; viz., *Donnelly v. United States,* 228 U.S. 243 (1913); *Mattz v. Arnett,* 412 U.S. 481 (1973); *United States v. Eberhardt,* 789 F.2d 1354 (9th Cir. 1986); *Blake v. Arnett,* 663 F.2d 906 (9th Cir. 1981); *Elser v. Gill Net Number One,* 246 Cal App 2d 30 (1966); *Arnett v. Five Gill Nets,* 48 Cal App 3d 454 (1975); *Donahue v. Justice Court,* 15 Cal App 3d 357 (1971).

In general, this case presents the latest theory, in a long line of alternate theories, argued by the State of California in asserting why it should be entitled to regulate fishing by Indians on the Klamath River.

2. The Proceedings Below

The instant criminal case was filed in the Justice Court of the Del Norte County Judicial District on January 19, 1982. The complaint charged respondents and eight other persons with criminal violations of law allegedly occurring in September 1981. The alleged violations were certain criminal violations of law prohibiting the sale of Klamath River salmon caught by gill net (Fish and Game Code §§ 8685.6, 8434) and conspiracy with others to commit said violations of law.

Respondents joined in a demurrer filed by a co-defendant which alleged a lack of State jurisdiction to prosecute Indian fishers who were subject to federal regulations promulgated by the Department of the Interior, Bureau of Indian Affairs. The thrust of the argument was a theory of federal preemption.

The Del Norte County District Attorney, representing the People of the State of California, filed a lengthy opposition to the demurrer. The theory argued by the State's brief was that although the fish were taken within the reservation the event of sale occurred at least twenty-five miles outside the exterior boundaries of the reservation; thereby conferring State law jurisdiction over said sale. It was argued that since the Department of the

Department of the Interior regulations set out in 25 CFR §258, et seq. prohibited commercial salmon fishing, as did the State statutes, there was "complete accord, and that there was no danger of a conflict between the State and Federal programs." The People cited *Arnett v. 5 Gill Nets,* 48 Cal App 3d 454 (1975) in support of an argument that although the State may not regulate Indian subsistence fishing on the Klamath River, Indian commercial fishing was an open question subject to possible regulation by the State.

The demurrer was denied by the Court and the matter was set for a preliminary hearing. Under California law, a preliminary hearing is an evidentiary hearing at which the prosecution must establish probable cause that a criminal offense occurred and that the accused committed the offense charged. (Penal Code §872.)

The evidence at the preliminary hearing consisted totally of the testimony of a Deparment of Interior, Fish and Wildlife agent relating to the alleged purchases of salmon in Crescent City, California and Medford, Oregon; 30 miles and 120 miles, respectively, from the Hoopa Valley Indian Reservation. There was a stipulation between the parties that Respondents were eligible Indian fishers of the Hoopa Valley Indian Reservation. Although the People were willing to stipulate that all the fish involved were taken from the Klamath River within the Hoopa Valley Indian Reservation by means of a gill net, Respondents declined that stipulation. No testimony was taken regarding the navigability of the Klamath River nor was any evidence presented that the Klamath River lay outside the actual reservation. At the preliminary hearing the Court declined to take judicial notice of letters from the Secretary of Interior.

At the conclusion of the preliminary hearing Respondents moved that the matter be dismissed since the federal regulatory scheme had preempted an inconsistent State scheme as to Indian fishers of the reservation. In arguing the matter the District Attorney conceded the authority of the Bureau of Indian Affairs to regulate fishing by the Indians on

the reservation. The prosecution agreed that the federal regulations apply to the waters of the Klamath and Trinity Rivers and their tributaries within the exterior boundaries of the Hoopa Valley Indian Reservation. The prosecution submitted the defendants' motion to dismiss upon the same points and authorities it had previously filed for the purposes of the demurrer.

On June 9, 1982, the Del Norte County Justice Court Judge, assigned, P. Timothy Murphy, issued a written opinion based upon the briefs and arguments of counsel relative to the issues and facts submitted at the preliminary hearing. The court framed the issue presented as ". . . whether the State of California can constitutionally pass legislation and enforce laws which control the manner in which eligible Indian fishermen can dispose of salmon off the reservation that have been taken from waters within the reservation." App. 2. The Court found that the State had no jurisdiction to prosecute the crimes alleged because the federally promulgated regulatory scheme preempted that field of conflicting State legislation. App. 2.

On June 18, 1982, the State filed a motion pursuant to Penal Code §871.5 to reinstate the complaint on the basis that, as a matter of law, the magistrate erroneously dismissed the action. The People defined their position in a concurrently filed petition for writ of mandate. That writ's points and authorities conceded that the State could not regulate subsistence fishing on the Klamath River because of its reservation status -- but sought to distinguish the instant matter because the salmon were sold off the reservation. The State then urged the Court to find that Congress had not shown a clear and manifest intention to preempt State law. Nowhere did the prosecution contend that the fish were not caught on the reservation because the State held title to the Klamath River as a navigable waterway.

The Superior Court granted the prosecution's motion to reinstate the complaint. The Respondents

thereafter moved to dismiss the complaint under California Penal Code §995 on the grounds that the Respondents were not legally committed by magistrate because the State lacked jurisdiction to so prosecute Indian fishers. An alternate theory to the motion was that the Respondents were committed without reasonable or probable cause to believe a crime had occurred and that they committed it. With few exceptions, a Penal Code §995 motion is based and decided exclusively on the transcript of the preliminary hearing. *People v. Brice,* 130 Cal App 3d 201, 208 (1982).

The hearing on the motion to dismiss was held on January 14, 1983, almost eight months after the preliminary hearing. There, for the first time, while the Superior Court sat as a reviewing court, did the State present the arguments now sought to be raised before this Court. Respondents timely objected to the State's requests for the use of judicial notice to present new evidence and attempts to raise new evidence not presented to, and thus not considered by, the Justice Court judge at the preliminary examination. The motion to dismiss was denied by the Superior Court. App. 8.

Respondents sought a writ of prohibition from the California First District Court of Appeals to prohibit the further prosecution of the charges based upon the State's lack of jurisdiction to prosecute the matter. The writ was stipulated to be held in abeyance pending the final disposition of *People v. McCovey,* 36 Cal 3d 517 (1984) - a case with identical issues.

After *McCovey* was resolved in favor of federal preemption Respondents abandoned their writ. The State opposed the abandonment and the writ was denied on State police power grounds.

The California Supreme Court granted certiorari and its ruling is the subject of the issues pending before this Court.

JURISDICTION

1. The Court Should Decline Review of the Petition Because it was Filed Out of Time.

Rule 20.1 of the Supreme Court of the United States deems a petition for review on certiorari in a criminal case to be timely if filed within sixty days of entry of judgment. Petitioner filed the instant petition eighty-six days after denial of rehearing by the California Supreme Court.

The fact that the matter before the Court is a criminal case cannot be reasonably disputed. Respondents are charged with violations of law and their liberty is in jeopardy. Although the pending proceedings can be characterized as civil in nature the case is a criminal one. The rule of court does not say in criminal proceedings or criminal actions, it says in criminal cases.

Review of criminal cases by States interested in prosecution is disfavored because of this Court's concern over constitutional rights, e.g. the right to speedy trial. *Will v. United States,* 389 U.S. 90, 96-98 (1961).

Even this court in *Heflin v. United States,* 358 U.S. 415 (1959), while stretching to grant certiorari, stated that a number of justices felt the petition should have been filed within the thirty day limit for criminal cases but that the defect was not jurisdictional.

An important consideration is that this case has been pending for over eight years since the acts were alleged to have occurred. Defendants were induced to hold their writ of prohibition in abeyance while *People v. McCovey,* 36 Cal 3d 517 (1984) was decided. At the State's request a document was executed and filed by Respondent waiving time to be brought to trial until ninety days after the filing of the remittitur of *People v. McCovey,* supra. Respondents attempted to abandon their writ of prohibition pending before the California appellate courts after the *McCovey* court decided in favor of

persons with issues similar to Respondents. This abandonment of the petition was prevented by the State's opposition to it and Respondent is still awaiting dismissal or trial.

2. This Court Should Decline to Find Jurisdiction Since the State Failed to Raise a Substantial Federal Question in that Petitioner Failed to Follow State Procedures in Raising the Federal Question.

This Court has consistently held that a litigant seeking review must have followed applicable State procedures in raising any federal question asserted. *In Re Lamkin,* 355 U.S. 59 (1957); *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *Hulbert v. Chicago,* 202 U.S. 275 (1906); *Edelman v. California,* 344 U.S. 357 (1953).

As previously mentioned, Petitioner did not assert that the Klamath River was not a part of the Hoopa Valley Indian Reservation at the trial court level. This theory was first advanced before the Superior Court as it sat as a reviewing tribunal considering whether the action should be dismissed pursuant to Penal Code §995.

Respondent immediately objected to Petitioner's inappropriate and untimely raising of this issue. It is a firm and long held California procedural rule that the only evidence which may be considered by a reviewing court is evidence actually presented to the committing magistrate. *Buck v. Superior Court,* 245 Cal App 2d 431 (1966); *People v. McKee,* 267 Cal App 2d 509 (1969); *People v. Taylor,* 250 Cal App 2d 367 (1967). Federal decisions are in accord with the well reasoned rule that arguments not raised below prior to review are improper and will not be considered by an appellate court absent exceptional circumstances. *Bell v. Wolfish,* 441 U.S. 520, 531 n.13 (1979); *Wiggins Bros. Inc. v. Department of Energy,* 667 F.2d 77, 83, cert. denied 102 S.Ct. 1749 (1982).

Rule 21.1(h) of the Supreme Court of the United States requires a petitioner seeking review of a state court decision to meet the burden that the question was properly raised by specifying in the statement of the case "the stage in the proceeding both in the court of first instance and in the appellate court, the method or manner of raising the federal question and the way in which they were passed upon by the court." The petition fails to even address its burden on this issue.

3. This Court Should Decline to Find Jurisdiction Since the State Failed to Raise a Substantial Federal Question in that Petitioner Seeks this Court to Make Factual Determinations Not Proven at the Trial Court Level.

This Court's policy that it will not exert its jurisdiction merely to review a decision of a state court based upon a question of fact, and that once a case is otherwise before it, the Court generally will not re-examine the state court's findings and conclusions of fact is well founded considering the number of petitions coming before it. *Grayson v. Harris,* 267 U.S. 352, 358 1925; *Portland Ry. Co. v. Railroad Commission,* 299 U.S. 397, 412 (1913); *Fry Roofing Company v. Wood,* 344 U.S. 157, 160 (1952).

Petitioner runs afoul of this court rule in two respects. First, the Petitioner's federal question is premised upon the assumption that the Klamath River is a navigable stream. Second, the trial court made a finding of fact that the fish were taken within the reservation. App. 1. No testimony was offered and no judicial notice was taken on this issue. Indeed this Court, in *Donnelly v. United States,* 228 U.S. 1035, after initially deciding that the Klamath River was non-navigable determined not to take judicial notice of its navigability as this factual determination should be made by a lower court. Indeed the *Donnelly* court specifically declined to take judicial notice of the purported navigability of the Klamath River. 228 U.S. at 709-710.

Petitioner alternatively asserts that the reservation does not include the Klamath River because of the language of the executive order and the State's admission into the Union prior to the formal recognition of the reservation. The trial court's finding that the fish were taken from waters within the reservation should not be re-examined by this court. App. 2. As this Court stated in *United States v. Johnson,* 268 U.S. 220, 227 (1925), "We do not grant a certiorari to review evidence and discuss specific facts." See *Texas v. Mead,* 465 U.S. 1041 (1984).

4. This Court Should Decline to Find Jurisdiction Since the State Failed to Raise a Substantial Federal Question in that the State Supreme Court Decision below is not in Conflict with the Prior Decisions of this Court and Lower Federal Courts.

Rule 17.1(c) of the Supreme Court of the United States requires that a court of appeals has "decided a federal question in a way in conflict with applicable decisions of this Court." There must be a real or "intolerable" conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized. *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 392-393 (1923). Petitioner urges review based on jurisdiction arising out of an alleged conflict between federal decisions and the California Supreme Court decision because the lower court quoted from *Arizona v. California,* 373 U.S. 546, 597-598 (1963) which addressed the reserved rights doctrine. The Court correctly stated that under the commerce clause of the United States Constitution the federal government retains the power to regulate navigable water ways for purposes of a reservation. The California Supreme Court declared that at the time the reservation was first created, the fishing rights of Yurok Indians were no less necessary to the existence of the Indians than the atmosphere they breathed. Petitioner's App. 20.

As a number of cases have held, the federal government retains the power under the supremacy and commerce clauses of the United States Constitution to regulate

fish and wildlife in observance of its trust relationship to Indian people. These authorities supporting this doctrine are discussed more extensively in the section set aside for that purpose in this brief under Argument.

5. This Court Should Decline to Find Jurisdiction Because it Lacks Justiciability in that the Underlying Criminal Case is Moot Having Been Dismissed by the Superior Court of the State of California on February 17, 1989.

Article III of the United States Constitution defines and limits the judicial power of the United States in terms as specified kinds of "cases" and "controversies". The Article III judicial power to decide only cases in controversy means that this Court should exercise its jurisdiction to determine the constitutionality of federal or state legislative acts only in the context of adjudging "the legal rights of litigants in actual controversies." *Liverpool S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39 (1885). The rule in federal court that an actual live controversy must be extant at all stages of appellate or certiorari review, not merely at the time the information is filed. *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975); *Steffler v. Thompson,* 415 U.S. 452, 459 n.10 (1974); *DeFunis v. Odegaard,* 416 U.S. 312, 319 (1974).

The underlying criminal case in this matter was dismissed against Respondents Antone Folkins and Kenneth Mattz by the Superior Court of the State of Califoria, County of Del Norte, on February 17, 1989. App. 10.

ARGUMENT

I. The Petition Should be Denied Because Petitioner is Barred from Raising the Federal Question Under the Doctrine of Res Judicata.

This Court should deny review of the federal question raised in the petition because it is "blocked" in that the California Supreme Court ruled that the Petitioner is precluded, under the doctrine of res judicata, from re-litigating the issue; an independent State ground. *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969); *Illinois v. Gates,* 462 U.S. 213, 218-220 (1983). The California Supreme Court held at Petitioner's App. 18-19 as follows:

> "To begin with, the People's broad claim that Yurok Indians enjoy no federally protected fishing rights in the Klamath River flies directly in the face of all of the recent federal and state decisions involving Yurok Indian fishing on the Hoopa Valley Reservation. As we have seen, in 1975 the California Court of Appeal specifically held in Five Gill Nets, supra, 48 Cal.App.3d 454, certiorari denied (1976) 425 U.S. 907, that state regulation of such on-reservation Indian fishing was preempted by the Indian's federally protected fishing rights; that holding, of course, is totally incompatible with People's present contention that the Yurok Indians enjoy no federally protected fishing rights in the Klamath River. Similarly, more recent federal decisions have likewise expressly recognized that '[t]he right to take fish from the Klamath River was reserved to the Indians when the reservation was created.' (United States v. Eberhardt, supra, 789 F.2d 1354, 1359; see Blake v. Arnett, supra, 663 F.2d 906, 909; Pacific Coast Fed. v. Secretary of Commerce (N.D. Cal. 1980) 494 F.Supp. 626, 632, 633.) And, of course, our McCovey decision also expressly held that the Yurok Indians possess federally reserved fishing rights in the Klamath River which are properly subject to federal regulation. (McCovey, supra, 36 Cal.3d at p.534.)

> Although the People acknowledge that their current contention is inconsistent with the opinions in each of these cases, they argue that because none of the prior decisions expressly considered the particular historical evidence or legal theory on which they now rely, those decisions should not be considered controlling authority. The reach of those decisions, however, may not be so readily circumvented. The issue of the existence of federally reserved Indian fishing rights was directly in question in each of these cases, and the State of California was in fact a principal litigant in several of the proceedings. The People had ample opportunity in the prior litigation to challenge the validity of Indian fishing rights in the Klamath River on the theory they now urge. Having failed to successfully pursue such a legal argument in those cases, they may not avoid the holdings of those decisions at this juncture by resort to ostensibly newly discovered historical evidence or a new legal theory. (See, e.g., Price v. Sixth District Agricultural Assn. (1927) 201 Cal. 502, 522 ['an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result.'] This is particularly true in a situation, like the present one, where many individuals have relied on the past decisions over a number of years and where a comprehensive federal regulatory scheme - adopted in the wake of the earlier decisions - has been in place for more than a decade. (Cf. Arizona v. California (1963) 373 U.S. 546, 598.)"

The State sought rehearing before the California Supreme Court for the sole purpose of persuading the Court to exclude preclusion on the doctrine of res judicata of the issues it had asserted over the years. The petition for rehearing was denied.

This Court has also held that a federal question may be so explicitly foreclosed by prior decisions of the Supreme Court as to leave no room for a real controversy. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311 (1902).

This court should find that the final judgments of the cases raised in the California Supreme Court decision below precludes the Petitioner from relitigating issues that were or could have been raised in those actions. *Allen v. McCurry,* 449 U.S. 90 (1980); *Bernhard v. Bank of America,* 19 Cal. 2d 807 (1942).

II. The Petition Should be Denied Because the Department of the Interior had the Authority to Promulgate Regulations Governing Indian Commerce and Subsistence Fishing in Waters Flowing Through an Indian Reservation Under Authority of its Trust Responsibility to Indian Peoples and Under the Supremacy and Commerce Clauses of the United States Constitution.

Petitioner and Amicus Curiae attempt to define the question raised as a conflict between this Court's decisions regarding the reserved rights doctrine and the California Supreme Court's over-expansion of that doctrine. In reality, the California Supreme Court merely applied a number of concepts laid down by this Court and reached a well founded decision.

When state legislation hinders or frustrates the purpose of federal wildlife regulations the state statutes violate the supremacy clause, Article VI Cl. 2, and cannot stand. *United States v. North Dakota,* 650 F.2d 911, 917, 458 U.S. 1129 (1983); *Washington v. Florida* Industrial Comm., 389 U.S. 235, 240 (1967). The United States stands in a trust relationship with ßthe members of the Hoopa Valley Indian Reservation, and extension thereto, similar to a guardian-ward relationship. *Worchester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831).

Congress has the power to regulate commerce with the Indian tribes. United States Constitution Article I Section 8, Cl. 3. A state does not own the water within its borders in the same manner as it owns the land underneath those waters. The state's sovereign power to control the use of the water must yield to a valid exercise of federal power. *Minnesota by Alexander v. Block,* 660 F.2d 1240, 1252, cert. denied 455 U.S. 1007 (1981). A state's control over its resources, including wildlife, does not prohibit the proper exercise of federal power. *United States v. Helsley,* 16 F.2d 784, 788 (9th Cir. 1979).

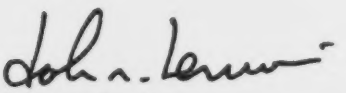
The regulations of the Secretary of the Interior (pursuant to Congressional authority) have the effect of federal law. The rule making authority upon which 25 CFR 258 of the Federal Regulations is based on Title 25 of the United States Code §§2, 9, and 262.

As stated in the California Supreme Court opinion below, the federal government has the authority to provide for the people of the reservation by regulating their primary source of subsistence. Indian commercial fishing is certainly an appropriate area for the federal government to exercise its authority over Indian commerce.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court deny the petition for writ of certiorari.

Respectfully submitted,



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Antone Folkins

Appendix A

IN THE JUSTICE COURT OF CALIFORNIA
COUNTY OF DEL NORTE
DEL NORTE JUDICIAL DISTRICT

Action No. 46-19

The People of the State of California,
Plaintiffs,

v.

Diane Mattz et al.,
Defendants.

[Filed June 9, 1982]

RULING ON MOTION TO DISMISS

This matter came on regularly for preliminary hearing in the Justice Court of California, County of Del Norte, Del Norte Judicial District, on Monday, May 24, 1982. Judge P. Timothy Murphy was assigned by the Judicial Council to hear the matter.

The evidence introduced in the preliminary hearing consisted of the testimony of John D. Gavitt, special agent for the U.S. Fish and Wildlife Service. The evidence indicates that all Defendants were, in some manner, involved in the commercial sale of salmon off the Reservation taken from the Klamath River within the Reservation at or about the times alleged in the complaint. At the conclusion of his testimony it was stipulated by District Attorney Robert Weir and defense counsel that all the above-named defendants were and are eligible Fishers and eligible Indians, pursuant to Title 25, Code of Federal Regulations, Section 258.5, i.e., Indian persons entitled to fish on the Klamath or Trinity River within the confines of the Hoopa Indian Reservation and the "Extension," defined as one mile on either side of the Klamath River from the westerly border of the Hoopa Reservation to the sea. At the close of the evidence introduced by the

prosecution, all defense counsel joined in a motion to dismiss the action for lack of jurisdiction, in addition to individual motions reflected in the transcript.

The issue presented by the motion to dismiss is whether the State of California can constitutionally pass legislation and enforce laws which control the manner in which Eligible Indian fishermen can dispose of salmon off the Reservation that have been taken from waters within the Reservation.

The parties have submitted extensive briefs, and after a review of the cases cited by all parties and the pertinent federal regulations, this magistrate concludes that the motion to dismiss must be and shall be granted for lack of jurisdiction.

Federal regulations regulating Klamath River fishing by Indians were first issued on August 12, 1977, and in those initial regulations the Department of Interior, Bureau of Indian Affairs specifically reserved the question of whether, absent the regulations, the Indians possessed rights to fish commercially in the Klamath River. Interim rules were adopted on July 13, 1978, which, in part, provide in the preamble:

> . . . Based upon the history of Indian fishing on the Klamath as well as on the substantial case law interpreting federal fishing rights, the Department has concluded that the Indians' reserved fishing right includes the right to use fish for commercial purposes . . .

The federal rules passed in July of 1978, (43 FR 135, pg 30052) specifically provide in Section 258.10 for the method of handling the sale of salmon and steelhead, and also specifically provide for the regulation of fish buyers both on and off the Reservation under Section 258.13. In Section 258.5, as amended, the regulations limited the catching of fish for sale to no more than five anadromous fish per day per person. The regulations were expanded, by the final rules enacted by the Bureau of Indian Affairs, Department of the Interior, on March 20, 1979. These regulations are extremely detailed and,

consumptive fishing under subdivision (r). Under Section 258.8(c) commercial fishing was prohibited for that year and the regulations provided for a comprehensive plan and method of enforcement for violation of any of the regulations under Sections 258.14 and 258.15. Section 258.17 specifically provides:

> The Hoopa Valley Indian Reservation Court of Indian Offenses established under 25 CFR Part II has jurisdiction which is limited to trying eligible Indians accused of violating the regulations of this Part and to determine whether nets and other fishing gear were forfeited.

Further regulations were passed in 1980 and 1981 modifying and changing various rules but consistently providing for a penalty on Indian fishers for violation of the rules, including violating the seasonal prohibitions against commercial fishing. Arnett v. 5 Gill Nets (1975) 48 Cal.Ap.3d 454, noted that Indians made their living by commercial fishing in the early years of the century, and further noted that Public Law 280, 28 USC 1360, provides that its application shall not deprive any Indian or tribal band of any right, privilege or immunity under federal treaty, agreement or statute with respect to hunting, trapping, fishing, or the control, licensing or regulation thereof. [Emphasis added.]

The State of California, through Section 8685.5 and 8434, Fish and Game Code, is clearly attempting to control commercial salmon fishing by the Indians of the Hoopa Reservation.

At this time it appears that the three tests to reach this decision, as indicated by the court in People v. Frank, 101CA3d Supp8 (1979), have been met -- especially as it refers to the regulation of the salmon fishery:

(1) The federal regulations are now extremely detailed and comprehensive as to the regulation of the salmon fishing on the Klamath River and it is reasonable to infer that Congress left no room for states to supplement them.

(2) The federal regulations specifically indicate that the commercial salmon fishery by Indians is in fact now regulated in an area exclusively under Federal jurisdiction.

(3) Enforcement of state law does in fact present a serious conflict with the administration of the federal program.

Having ruled that this court has no jurisdiction, it is unnecessary to rule on the other pending motions; and the complaint against the above-named defendants is hereby dismissed.

DATED: June 8, 1982.

P. Timothy Murphy
Assigned Judge

Appendix B

IN THE SUPERIOR COURT
OF THE
STATE OF CALIFORNIA

COUNTY OF DEL NORTE

Action No. 82-053-C

The People of the State of California,
Plaintiffs,

v.

Diane Sue Mattz, et al.,
Defendants.

The People of the State of California,
Petitioner,

v.

Diane Sue Mattz, et al.,
Real Parties in Interest.

[Filed Oct. 4, 1982]

RULING

The Court heard a motion under Section 871.5 of the Penal Code, and a Petition for Writ of Mandate, both brought by the People for the purpose of compelling the Magistrate to reinstate a complaint in Action No. 46-19 of the Justice Court of the Del Norte Judicial District.

The Court proceeded as to all defendants (and real parties in interest) except DIANE MATTZ and RAYMOND MATTZ.

The Court has read the transcript and reviewed the record in the Justice Court.

At the preliminary examination, the Magistrate ruled that, because of Federal preemption, the State court has no jurisdiction. On this basis, the complaint was dismissed (except as to GILBERTA WHIPPLE, whose preliminary examination was not held at that time).

The Federal regulation in effect at the time allowed no commercial fishing for salmon in the Klamath River. Neither Indians nor non-Indians could sell the fish in question either on or off the Reservation. (See People v. Frank, 101 Cal.App.3d 8 (1979).) The Federal regulation contains no express preemption provision. The allegedly criminal acts took place off the Reservation. There is no Federal preemption as to such activity without an express preemption provision (White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 65 L.Ed.2d 655 (1980), footnote 11.).

The Court interprets the action of the Magistrate as being that, because of lack of jurisdiction, he found that no public offense had been committed (Penal Code Section 871). Section 871.5 is therefore an appropriate remedy.

The State does have jurisdiction, and the petition under Section 871.5 is granted. The Magistrate is ordered to reinstate the complaint and resume proceedings.

The Petition for a Writ of Mandate is denied, as the foregoing action renders relief under that theory unnecessary.

DATED: OCTOBER 1, 1982.

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Thomas M. Montgomery
Judge of the Superior Court,
Assigned

Appendix C

IN THE JUSTICE COURT OF CALIFORNIA
COUNTY OF DEL NORTE
DEL NORTE JUDICIAL DISTRICT

Action No. 46-19

The People of the State of California,
Plaintiffs,

v.

Diane Mattz et al.,
Defendants.

[Filed Oct. 22, 1982]

PROCEEDINGS

All above defendants held to answer in Superior Court as charged.

All above defendants to appear in Superior Court on November 12, 1982 at 8:30 a.m.

Appendix D

IN THE SUPERIOR COURT
OF THE
STATE OF CALIFORNIA

COUNTY OF DEL NORTE

Action No. 82-053-C

The People of the State of California,
Plaintiffs,

v.

Diane Mattz et al.,
Defendants.

[Filed Aug. 26, 1983]

RULING

All defendants challenged the jurisdiction of the Court by way of motions to dismiss, and again in the P.C. 995 motions as to the charges.

The request by the Attorney General that the Court take judicial notice of preferred Exhibits One (1) through Nine (9), and Twelve (12) through Eighteen (18), Twenty-one (21), Twenty-three (23), and Thirty (30) is granted. The offer of the remaining Exhibits Ten (10), Eleven (11), Nineteen (19), Twenty (20), Twenty-two (22), Twenty-four (24), and Twenty-nine (29) is denied.

The preemption analysis did not control questions of the applicability of state law to Indians outside the reservation, (People v. McCovey, 145 CA 3d 190.), and,

Indians going beyond reservation boundaries . . . have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state absent federal law to the contrary. (People v. McCovey, Supra 198.) The motions to dismiss are therefore denied.

Each of the defendants joined in the challenge to the record under the provisions of P.C. 995 as to each of them, individually, and the Court having reviewed the record as to each defendant denies each of the motions.

The case is to be calendared for September 16, 1983 at 9:15 a.m. for setting.

DATED: August 26, 1983.

Charles M. Thomas, Jr.
Judge of the Superior
Court, Assigned

Appendix E

IN THE SUPERIOR COURT
OF THE
STATE OF CALIFORNIA

COUNTY OF DEL NORTE

Action No. 82-053-C

The People of the State of California,
Plaintiffs,

v.

Antone Folkins, et al.,
Defendants.

[Filed Feb. 17, 1989]

ORDER OF DISMISSAL AS TO
DEFENDANTS ANTONE FOLKINS
AND KENNETH MATTZ

The Court has received a peremptory writ of prohibition restraining the Superior Court of Del Norte County, henceforth and forever from any further proceedings on the criminal charges pending against Defendants, Antone Folkins and Kenneth Mattz, except dismissal thereof.

The People of the State of California moved that the Court continue action on the peremptory writ until the end of March so that the U.S. Supreme Court could act upon a petition for writ of certiorari before it regarding the parties hereto. This matter was heard in the above-entitled Court on February 17, 1989 at the hour of 9:00 a.m. The People of the State of California were represented by Charles Gettz. Defendant Antone Folkins was represented by dohn r. henion, Esq. who specially appeared for George Forman, attorney for Kenneth Mattz.

Having considered the matter in the file, including the responses of the parties hereto orally and in writing, the Court